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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/772,442	02/06/2004	Helmuth Fuchs	31915-192514	5147
26694	7590	03/22/2007		
VENABLE LLP P.O. BOX 34385 WASHINGTON, DC 20043-9998			EXAMINER STULII, VERA	
			ART UNIT	PAPER NUMBER
			1761	
SHORTENED STATUTORY PERIOD OF RESPONSE		MAIL DATE	DELIVERY MODE	
3 MONTHS		03/22/2007	PAPER	

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

8

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/772,442	FUCHS ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Vera Stulii	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 06 February 2004.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-17 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-17 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date <u>06/21/2004</u> . | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Claim Objections***

Applicants' claims should recite positive, active method steps, rather than past actions. For example, "different sugar varieties are moistened" should be "moistening different sugar varieties", etc. The phrase "characterized in" should be "wherein", in accordance with accepted US practice.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-17 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Regarding claim 1, it is not clear what is meant by "gelatinizing and/or thickening *characteristics*". It is unclear as to what properties or characteristics are considered to render this effect.

Regarding the phrase "gelatinizing and/or thickening agents" in claims 1, 7, 8, 11, and 15, it is not clear whether the recited component is:

- a thickening and gelatinizing agent at the same time (for example, gelatin); or
- more than one compound is recited and at least one gelatinizing agent and at least one thickening agent; or
- more than one compound is recited and recited compounds are gelatinizing agents; or

Art Unit: 1761

- more than one compound is recited and recited compounds are thickening agents.

Claims 1 and 2 are indefinite for the recitation of the phrase "sugars varieties". It is unclear whether the phrase refers to one type of sugar, or more than one type of sugar.

Claims 1 and 2 are also indefinite for the recitation of the phrase "different sugars varieties". In claim 1, it is unclear as to whether this phrase is directed to:

- sugar(s) recited in step a) is different from sugar(s) recited in step b); or
- more than one sugar is recited in step a); or
- more than one sugar is recited in step b); or
- more than one sugar is recited in both steps a) and b);
- some other interpretation.

Claims 1 and 2 are indefinite for the recitation of the phrases "(preferably 3%)", "(preferably 0.2 %)". Regarding claims 1 and 2, the phrase "preferably" renders the claim indefinite because it is unclear whether the limitations following the phrase are part of the claimed invention. Also in regard to claims 1 and 2, a broad range or limitation together with a narrow range or limitation that falls within the broad range or limitation (in the same claim) is considered indefinite, since the resulting claim does not clearly set forth the metes and bounds of the patent protection desired. See MPEP § 2173.05(c). Note the explanation given by the Board of Patent Appeals and Interferences in *Ex parte Wu*, 10 USPQ2d 2031, 2033 (Bd. Pat. App. & Inter. 1989), as to where broad language is followed by "such as" and then narrow language. The

Art Unit: 1761

Board stated that this can render a claim indefinite by raising a question or doubt as to whether the feature introduced by such language is (a) merely exemplary of the remainder of the claim, and therefore not required, or (b) a required feature of the claims. Note also, for example, the decisions of *Ex parte Steigewald*, 131 USPQ 74 (Bd. App. 1961); *Ex parte Hall*, 83 USPQ 38 (Bd. App. 1948); and *Ex parte Hasche*, 86 USPQ 481 (Bd. App. 1949). In the present instance, claim 1 recites the broad recitation 0.01% to 10%, and the claim also recites 3% which is the narrower statement of the range/limitation.

Claim 1 is also indefinite for the following recitation in step b): “[d]ifferent sugar varieties are moistened inside a separate mixing apparatus by mixing together 0.01% to 10% water (preferably 3%) and/or mono- or multivalent alcohols (preferably 0.2 %)”. It is unclear as to how mixing “water ... and/or mono- or multivalent alcohols” would result in moisturizing sugars.

Claim 7 is indefinite for the recitation of the phrase “different animal and/or microbially produced gelatinizing and/or thickening agents” (see regarding “different sugars varieties” above).

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Art Unit: 1761

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

**Claims 1-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over De Brou et al (US 3,930,052) in view of Chen et al (4,338,350).**

In regard to claims 1 and 2, De Brou et al disclose "gelatin compositions which when treated with cold water do not tend to agglomerate and clump but rather dissolve smoothly" (Col.1 lines 5-6). De Brou et al disclose mixing finely ground gelatinizing and thickening agents such as gelatin, guar gum, etc. with sugars. More than one type of sugar is added to the mixture and homogeneously mixed with gelatin mixture (Col.7 Example 6).

Art Unit: 1761

In regard to claims 3 and 11, De Brou et al disclose that gelatinizing/thickening agents to sugar ratio is in the range from 1:1 to 1:15 (Col. 5-8 Examples 1-11).

In regard to claims 4 and 12, De Brou et al disclose fruit acid such as citric acid (Col. 3 line 46), aromatic agents such as vanilla and cocoa powder (Col. 6 Examples 3, 4), fruit powder such as lemon powder (Col. 8 Example 11), coloring agents and sweeteners (Col. 5-8 Examples 2, 4, 7, 11).

In regard to claims 5 and 13, De Brou et al disclose sugars such as glucose, sucrose, fructose, lactose, maltose, etc. (Col. 3 lines 43-44).

In regard to claims 6 and 14, De Brou et al disclose that the particle size of comestible component such as sugar does not exceed 500 microns (0.5 mm) (Abstract).

In regard to claims 7 and 15, De Brou et al disclose that different gelatinizing/thickening agents are mixed together (Col. 6-8 Examples 4, 6, 11). De Brou et al disclose the following raw material for gelatin: "bones from India, fresh degreased bones, cowhide, pigskin, waste from the leather industry, sinews, conyskins, etc" (Col. 4 lines 6-10). De Brou et al disclose that "[t]he ingredients which can be utilized also comprise thickening, gellifying and/or stabilizing agents such as alginic acid and their salts, particularly sodium and calcium alginates, pectic acid and its salts, alkali metal carrageenates, agar-agar, locust-bean flour, guar gum, gum tragacanth, gum arabic, substituted celluloses such as carboxymethylcellulose and its sodium salt, methylcellulose etc" (Col. 3 lines 47-54).

Art Unit: 1761

In regard to claims 8 and 16, De Brou et al disclose that gelatin component has a particle size not exceeding 210 microns (0.21 mm) (Abstract).

In regard to claims 9 and 17, De Brou et al disclose natural preservative and antioxidant such as citric acid (Col. 3 line 46).

In regard to claim 10, De Brou et al disclose preparation of smooth paste, jelly, mousse, whipped fresh cream, etc. (Col. 5-6 Examples 1-4).

De Brou et al do not disclose moistening sugar inside a separate mixing apparatus.

Chen et al disclose producing dry, granular, free-flowing, non-caking, and readily dispersible in water crystallized sugar gelatin concentrate (Abstract). Chen et al disclose incorporating gelatin into a crystalline sugar matrix in order to produce a gelatin concentrate that may be readily dispersed or dissolved in liquid (Col. 2 lines 24-33). Chen et al disclose preparing supersaturated sugar syrup having a solids content of about 90-98% (Col. 3 lines 9-25). Chen et al disclose homogeneously mixing supersaturated sugar solution with gelatin (Col. 6 Examples 1, 2).

Since De Brou et al disclose producing "gelatin compositions which when treated with cold water do not tend to agglomerate and clump but rather dissolve smoothly" by mixing finely ground gelatin with sugars, and Chen et al disclose producing dry, granular, free-flowing, non-caking, and readily dispersible in water crystallized sugar gelatin concentrate by mixing sugar syrup (i.e. moistened sugar) with gelatin, it would have been obvious to one of the ordinary skill in the art to modify the disclosure of De Brou, and employ the step of mixing gelatin component with moistened



Art Unit: 1761


sugar (sugar syrup) in order to incorporate gelatin into a crystalline sugar matrix in order to produce a gelatin concentrate that may be readily dispersed or dissolved in liquid as taught by Chen et al.


### **Conclusion**

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Vera Stulii whose telephone number is (571) 272-3221. The examiner can normally be reached on 7:00 am-3:30 pm, Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Vera Stulii   
Examiner, AU 1761

  
KEITH HENDRICKS  
PRIMARY EXAMINER